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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

183 MISC.

HOWARD S. GIBSON,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S OPPOSING BRIEF

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RESPONDENT'S OPPOSING BRIEF

Petitioner seeks a review by this honorable court of the judgment of the District Court of Appeal, Second Appellate District, State of California, rendered on May 25, 1949, affirming his conviction of murder in the first degree and sentencing the petitioner to imprisonment for the term of his natural life. A petition for a hearing in the Supreme Court of the State of California was denied on June 23, 1949.

Petitioner asserts that said judgment was rendered in violation of the Fourteenth Amendment to the Constitution of the United States for the following reasons: (1) That the defendant was denied counsel of his choice; (2) That the defendant was denied an opportunity to present his defense of unconsciousness

through the medium of a doctor called for that purpose.

STATEMENT OF CASE

On January 29, 1948, an information was filed in the Superior Court of Los Angeles County, State of California, alleging that on January 11, 1948, the defendant murdered Margaret H. Gibson (his wife). (Cl. Tr., pp. 1-2.) On February 26, 1948, he entered his plea of "not guilty as charged in the information" and further entered a plea that he was not guilty of the offense because he was insane at the time he was alleged to have committed the offense. The court appointed three doctors (Section 1027 of the Penal Code) to examine the appellant as to his sanity and report to the court his mental condition. (Cl. Tr., p. 6.) On June 7, 1948, at 10 a.m. the case was called for trial. Twelve jurors were drawn. The case was continued to June 8th at 10 a.m. (Cl. Tr., p. 10.) The trial was resumed on June 8th at 1.30 p.m. The jury was impaneled and sworn and the case continued to June 9th at 1.30 p.m. (Cl. Tr., pp. 18, 19.) On June 10th and 11th the trial resumed and on June 11, 1948, the jury returned its verdict of guilty of murder of the first degree, fixing the penalty of life imprisonment. (Cl. Tr., pp. 24-25.) On June 14th, 1948, the insanity issue was tried by the same jury and it returned its verdict finding the appellant sane at the time he committed the offense. (Cl. Tr., p. 78.) On July 9, 1948, petitioner's motion for new trial was denied. (Cl. Tr., pp. 83-91, 109.) On July 9, 1948, judg-

ment and sentence was pronounced, sentencing petitioner to the state prison for his natural life. (Cl. Tr., p. 109.) On July 16, 1948, appellant filed his notice of appeal. (Cl. Tr., pp. 112-115.) The judgment was affirmed by the District Court of Appeal. (*People* v. *Gibson* (1949), 92 A. C. A. 72; 206 Pac. 2d 375.) A petition for hearing in the Supreme Court was denied June 23, 1949. (*People* v. *Gibson* 34 A. C. No. 2, Minutes of the Supreme Court, p. 2.)

STATEMENT OF FACTS

The facts are correctly set forth in the opinion of the District Court of Appeal, Second Appellate District, State of California, rendered on appeal from the judgment. (*People* v. *Gibson* (1949), 92 A. C. A. 72; 206 Pac. 2d 375.) Briefly, the facts show that petitioner and his wife were separated. He was a butcher by trade. He called his employer about 1.15 a.m. on January 11, 1948, and told him that he had family trouble and "I just killed my wife."

In addition to other evidence in the case, Officer Alcorn testified that when they took the defendant to the police station they had a conversation with him, and he testified that the defendant stated that at about 10 p.m. on January 10th, with the thought still on his mind that his wife had lied to him about her place of residence, he went to a dresser drawer and removed from it a knife which was wrapped in butcher paper and a magazine; that he placed the knife in his overcoat pocket, left the room, called for

and met a cab in front of his house; that he went to a large tree which was about 10 feet from the door of his wife's apartment, removed the knife from his overcoat pocket, took the paper from the knife and threw the paper over the fence, and stuck the knife in the tree; that he then waited there for about two hours until his wife and an unknown person arrived at the back gate; that he saw the gate open and saw his wife enter, and he believed the other person to be a man who was standing there, and with this, he (the defendant) blew his top, ran over to the gate, and with the knife in his right hand slashed at his wife seven or eight times, and berated her for being untrue to him; that his wife forced her way past him, went to the apartment door, took her key from her purse, unlocked the door, and entered the apartment; that she went across the living room and into the bathroom, and he followed her into the bathroom; that she then walked into the shower room and he followed her into that room, and with the knife still in his right hand and with one sweep he cut her throat; that before he cut her throat she was merely standing in the corner of the shower; that he believed that with his left hand he grabbed his wife's head by the hair and held it back while he slit her throat; that he had been married to her about four years; that shortly after their marriage he had reasons to believe that she had been unfaithful to him, and that he had an act of this type in his mind for some time. (Rep. Tr., pp. 212-228, 247, 248.)

ARGUMENT

I. Petitioner Was Not Denied the Effective Aid of Counsel

The petitioner asserts that "The defendant and petitioner was denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States when the judge refused a continuance of the case to permit him to have counsel of his own choice, who had prepared the case for him." (Petition, p. 6.)

In *People* v. *Goldenson* (1888), 76 Cal. 328, 341-342, the court stated:

> "* * * To hold that a defendant charged with crime has an absolute right to counsel of his own selection, with unlimited right to insist upon continuances of his trial, and that the court, jury and witnesses must await the convenience of his counsel in fulfilling other engagements, would be subversive of the prompt administration and execution of the laws,—upon which depends largely their effectiveness,—and subject the time and service of citizens serving the state gratuitously, as jurors and witnesses, to the wishes and interest of the attorney engaged in the defense. It is too apparent for argument that the court below must, in the nature of things, have some control over such matters; and if it has any discretion, it is equally apparent that it was not abused in this particular instance."

The record shows that the information was filed on January 29, 1948. (Cl. Tr., pp. 1-2.) Appellant appeared with his counsel, Mr. Lavine on February 2,

1948, and requested a continuance to February 13th. (Cl. Tr., p. 3.) On February 13th the case was continued to February 20th. (Cl. Tr., p. 4.) On February 20th it was continued to February 26th. (Cl. Tr., p. 5.) On February 26th appellant entered his pleas and the trial was set for April 27, 1948. (Cl. Tr., p. 6.) On April 27, 1948, the appellant with his counsel Mr. Lavine, by Mr. Saifer, were in court and Mr. Saifer stated that Mr. Lavine was engaged in another trial and would like to have the case continued until the 18th of May. The court stated that if it is continued beyond today it will have to be Monday, June 7th. The case was continued to June 7th. (See Supp., Rep. Tr.) On June 7, 1948, the appellant with counsel, Mr. Lavine by Mr. Rubin (Cl. Tr., p. 10), moved for a continuance based on the affidavit of Mr. Lavine (Cl. Tr., pp. 8-9), because Mr. Lavine was engaged in trial, and Mr. Rubin stated that on June 15th Mr. Lavine must start a trial in a case that was expected to last from four to six weeks. The people announced that they were ready for trial. (Rep. Tr., p. A-1.) The motion for a continuance was denied. A recess was taken until 11 a.m. the same day. (Rep. Tr., pp. A-3 to A-4; Cl. Tr., p. 10.) After the recess, the court appointed Mr. Rubin to represent the appellant. (Rep. Tr., p. A-5.) Mr. Rubin stated he was not prepared to go to trial. A short recess was taken. (Rep. Tr., pp. A-5 to A-6.) After the recess an adjournment was taken until 10 a.m. the following day, June 8, 1948. (Rep. Tr., p. A-18.) On June 8th the court convened at 10 a.m., the appellant being present, at which time

Mr. Rubin presented the affidavit of Howard D. Gibson (Cl. Tr., pp. 11-12), the affidavit of Eugene M. Frankenberger (Cl. Tr., pp. 13-14), and the affidavit of Ralph R. Rubin (Cl. Tr., pp. 15-17) in support of a motion for a continuance.

The affidavit of Mr. Rubin is dated June 7, 1948, and Mr. Rubin states, among other things, that the court appointed him to act as attorney for the defendant and that by reason of his inexperience he would not be ready for trial on June 8th and requested a reasonable continuance. (Cl. Tr., pp. 15-17.) The court stated, "I have read the affidavits. The motion is denied." The matter was continued until 2 p.m. (Rep. Tr., p. A-19.)

On June 8, 1948, at 1.30 p.m. the court told the defendant to examine the jury for cause. (Rep. Tr., p. A-24.) Mr. Rubin examined the jury for cause. A jury was impaneled and sworn to try the case. (Rep. Tr., p. A-28; Cl. Tr., p. 19.) The jury was excused and directed to return the following day (June 9th) at 1.30 p.m. (Rep. Tr., p. A-31; Cl. Tr., p. 19.)

On June 9, 1948, at 2 p.m. the first witness was called and the trial proceeded, appellant being represented by Mr. Rubin, and on June 11, 1948, the jury returned its verdict of guilty. (Cl. Tr., pp. 20-25.) The insanity issue was continued to June 14, 1948. (Cl. Tr., p. 25.) On June 14, 1948, the case was called up for trial on the insanity issue, attorney Rubin being present. On the same date the jury retired and returned its verdict finding the defendant sane at the

time of the commission of the offense charged. (Cl. Tr., pp. 68-69.)

On July 9, 1948, the petitioner with his counsel, Mr. Rubin, were present and presented a motion for a new trial which was denied, and no legal cause appearing, the court pronounced judgment. (Cl. Tr., pp. 109-111.)

From the record it appears that petitioner's counsel Mr. Rubin was granted a continuance of one and one-half days before starting the selection of the jury, which was two and one-half days before the first witness for the prosecution was called. The trial on his plea of not guilty continued for two days after the first witness was called.

The Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial; the fact, standing alone, that a continuance has been denied does not constitute a denial of due process under the constitutional right to the assistance of counsel. The test is: was his trial offensive to the concept of due process; did the defendant have the effective aid of counsel; did his counsel perform his full duty intelligently and well; does the record disclose that counsel could have done more had additional time been granted. The entire record is the best evidence that due process was not denied.

Avery v. *Alabama* (1939), 308 U. S. 444, 446-447, 84 L. Ed. 377;

People v. *Dorman* (1946), 28 Cal. 2d 846, 850;

Betts v. *Brady* (1942), 316 U. S. 455, 86 L. Ed. 1595;

Canizio v. *New York* (1945), 327 U. S. 82, 90 L. Ed. 545;

Butte v. *Illinois* (1947 Term), U. S. Supreme Court Law ed., Adv. Op., Vol. 92, No. 14, p. 735;

People v. *Ives* (1944), 17 Cal. 2d 459, 476-477;

People v. *McNabb* (1935), 3 Cal. 2d 441, 447-448;

People v. *Whinnery* (1942), 55 Cal. App. 2d 794, 798-799.

In petitioner's case, *People* v. *Gibson* (1949), 92 A. C. A. 72, 92-93, 206 Pac. 2d 375, 386-387, the court said:

"The record in the present case, which includes the arguments to the jury, shows that Mr. Rubin, as counsel for appellant, performed his full duty intelligently and well; that his representation of appellant was not a mere formality, but was an able, earnest, and thorough representation throughout the trial. His arguments to the trial judge and the jury, his cross-examination of witnesses, and his objections to questions and procedure establish that he was well informed concerning the law and the facts in the case, and that he was alert and immediately ready to meet and to present the legal and factual questions involved. The reporter's transcript consists of 447 pages and this opinion should not be extended by referring to and quoting the portions thereof which illustrate that appellant's counsel represented him in the manner above stated. In the case of People v. McNabb, 3 Cal. 2d 441, the court said at page 448, 45 p. 2d 334, at page 336: 'In short, the voluminous record is a formidable answer to any claim that counsel was not fully prepared for trial.' In the case of People

v. Ives, 17 Cal. 2d 459, 110 P. 2d 408, wherein the defendants had been convicted of murder in the first degree and wherein one of the appellants had been represented by an attorney appointed by the court, it was contended that his attorney, who had been admitted to the bar one year, was incompetent to properly represent that appellant. The court therein said, 17 Cal. 2d at page 477, 110 P. 2d at page 418: 'The reason advanced (referring to admission to the bar) is hardly pertinent in gauging the competency of an attorney to conduct a murder trial. He might have had twenty years of experience in the trial of civil cases and yet be grossly incompetent to defend one upon a charge of murder. One may be especially adapted to try criminal cases, irrespective of the length of time he has been practicing. * * * The best criterion of the competency, care and alertness of the attorney referred to is the record in the case.' In the present case it does not appear that a more seasoned attorney could have done more in representing appellant than was done by appellant's counsel. The appellant admitted orally and in his letters that he killed his wife. He was permitted to give his testimony in narrative form, and he was not cross-examined. On appellant's motion for a new trial the trial judge considered his assertion that the court had erred in denying the motion for a continuance, and in compelling him to go to trial with Mr. Rubin as his attorney. The denial of the motion for a new trial indicates that the trial judge, who of course had observed the manner in which appellant had been represented at the trial, was of the opinion that counsel for appellant had performed his full duty intelligently and well. The

appellant was not deprived of 'due process of law.' None of his substantial rights was prejudicially affected by the denial of his motion for a continuance."

The Constitution, statutes and judicial decisions of the State of California are the authentic forms through which the sense of justice of the people of California expresses itself in law.

Snyder v. *Mass.* (1933), 291 U. S. 97, 78 L. Ed. 674, 90 A. L. R. 575, 588.

The California appellate courts, supported by decisions of the Supreme Court of the United States, have declared that the procedure followed in petitioner's case did not deny him due process of law.

There was no infringment of any rights of petitioner guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

II. The Petitioner Was Not Denied Due Process of Law in Not Permitting a Doctor to Testify to Petitioner's Unconsciousness

In his petition he states:

"The petitioner was entitled under due process of law guaranteed by the Fourteenth Amendment to show his state of mind at the time of the alleged occurrences in his defense of not guilty. The trial court denied the defendant the right to produce the doctor expert who was prepared to testify, to wit: Dr. Victor Parkin. In California a state of unconsciousness at the time of the occurrence is a complete defense. (Section 26, Subdivision 5, of the Penal Code, State of California.)"

The petitioner cites no decisions in support of this statement.

The petitioner's statement that "unconsciousness at the time of the occurrence is a complete defense" is not a correct statement of the law.

Subdivision 5 of Section 26 of the Penal Code is restricted in its contemplation to persons of sound mind suffering from some condition rendering them unconscious of their acts, such as somnambulist, or persons suffering with delirium from fever or drugs (*People* v. *Methever* (1901), 132 Cal. 326), or epilepsy (*People* v. *Freeman* (1943), 61 Cal. App. 2d 110), or a blow on the head inflicted on the victim at the time of the act by his assailant.

People v. *Cox* (1944), 67 Cal. App. 2d 166

Where the unconsciousness is caused by voluntary intoxication from liquor (*People* v. *Taylor* (1939), 31 Cal. App. 2d 723), or taking narcotic drugs, it is no defense.

People v. *Sameniego* (1931), 118 Cal. App. 165;
People v. *Lim Dum Dong* (1938), 26 Cal. App. 2d 135;
People v. *Murphy* (1934), 1 Cal. 2d 37, 40;
People v. *Anderson* (1948), 87 Cal. App. 2d 857, 860-861.

The petitioner testified that while waiting by the tree for his wife to return he "fell asleep or passed out intoxicated"; that when he awoke he saw his wife with her back and left side toward him, just extending

her arms around a man's neck; that this man had his hands on her buttocks, apparently pulling her toward him; that when he saw the man in this position he described the situation as follows: " '* * * it was like a toy balloon that was blown up—becoming beyond bounds or out of proportion, only it was like a light, a light bursting, or a light bulb expanding. Everything was a white light. I do remember lunging and striking out at her'; that 'that is the last knowledge, the bursting of light, an extreme light or a white light, as you might describe it, that I had any knowledge of it until being in a taxicab on my way home to my residence,' and 'the next memory I had (after that) was I spoke to the two arresting officers.' "

People v. *Gibson* (1949), 92 A. C. A. 72, 76-77.

In petitioner's case, *People* v. *Gibson,* (1949), 92 A. C. A. 72, 84, 206 Pac. 2d 375, 382, the court stated:

> "* * * Although he testified that 'the bursting of light' was the last knowledge he had until he was 'in a taxicab on my way home' he also testified that he did 'remember lunging and striking out at her.' The fact that he knew he lunged and struck at her establishes that he was not unconscious for a while at least after the alleged 'bursting of light.' In view of that testimony of appellant showing that he was conscious of making the assault, the proffered testimony of the psychiatrist, to the effect that in his opinion there might be circumstances in which a man might commit an assault and might not be conscious thereof, would be practically valueless. It is also to be noted that appellant testified in fine detail as to what he saw when his wife and

the man arrived at the place where he was waiting * * *."

The court, at petitioner's request, gave three instructions to the effect that if appellant was not conscious of his acts at the time he killed his wife the jury should find him not guilty. (*People* v. *Gibson* (1949), 92 A. C. A. 72, 86.)

If error was committed in refusing to permit Dr. Parkin to testify to petitioner's "state of mind at the time of the alleged occurrence in his defense of not guilty," such error, if any, was neither prejudicial to defendant's rights nor a denial of due process of law.

In *Gryger* v. *Burke* (1947 Term), U. S. Supreme Court, L. Ed., Adv. Op., Vol. 92, No. 14, p. 735, the court, among other things, stated: "We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."

We notice petitioner states that (Petition, page 3), "The occurrences took place in Beverly Hills, California, but the trial took place in Santa Monica, California."

The offense took place in Los Angeles County, California, and was tried in the Superior Court of the State of California, in and for the County of Los Angeles, at Santa Monica. The superior courts have jurisdiction of felony cases (Art. VI, Sec. 5, California Constitution). There is no superior court sitting in Beverly Hills.

III. The Petitioner Was Not Denied a Fair Trial

The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right. That condition did not exist in petitioner's case.

Though justice be due the accused, it is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

> *Snyder* v. *Mass.* (1933), 291 U. S. 97, 78 L. Ed. 674, 98 A. L. R. 575.

It is apparent from the decision in petitioner's case (*People* v. *Gibson* (1949), 92 A. C. A. 72; 206 Pac. 2d 375), that at his trial and on appeal the fundamental rights of due process were afforded him. He had a fair trial.

CONCLUSION

For the foregoing reasons the writ of certiorari prayed for should be denied.

Respectfully submitted,

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